

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 95-19
(October 20, 1995)

**Disqualification in Cases Where Judge's
Spouse Supervises Other Prosecutors**

Issue

Is a superior court commissioner who is married to a supervising deputy county attorney required to disqualify herself in criminal matters in which attorneys from the supervisor's section appear?

Answer: No, unless other circumstances indicate that the commissioner's impartiality might reasonably be questioned.

Facts

The inquiring judge is a superior court commissioner who also acts as a superior court judge pro tempore. She is currently assigned to a criminal calendar in which the prosecutors are members of a trial group supervised by the judge's husband, who is a deputy county attorney. The judge's duties on her current calendar consist of conducting probation revocation hearings and sentencing probation violators. When assigned to other calendars, the judge may take pleas and conduct trials.

Although the judge's spouse does not appear in court on these matters, he supervises deputy county attorneys who do appear. In fact, *all* of the prosecutors who appear on the judge's current probation revocation calendar are supervised by the spouse. The inquiring judge informs us that, except for checking minute entry orders for errors, the spouse's duties related to the probation revocation calendar are merely administrative.

Discussion

The question presented is controlled by Canon 3E, Disqualification. It provides:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

. . . .

(c) the judge knows that he or she . . . or the judge's spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the proceeding;

Advisory Opinion 95-19

(d) the judge or the judge's spouse . . .

(ii) is acting as a lawyer in the proceeding.

Canon 3F, Remittal of Disqualification, is also applicable. It provides:

A judge disqualified by the terms of Section 3E may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If the parties and their lawyers after such disclosure and an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement should be incorporated in the record of the proceeding.

The mere fact that the judge is married to a prosecutor clearly does not disqualify the judge from sitting in criminal cases. *See* Opinion 95-10. On the other hand, we can say with equal certainty that the judge cannot sit in any matter in which her husband is the prosecuting attorney. However, there are many situations between these extremes, including the facts presented here.

There are three possible sources of difficulty: the spouse's administrative role as a supervisor, the spouse's role as an attorney in supervising other prosecutors, and the risk that the judge may obtain personal knowledge of cases from the spouse.

We consider first the spouse's administrative role. We are informed only that the spouse schedules the attorneys in his section. If that is the full extent of his involvement, then we perceive no problem. However, if the spouse is required to evaluate the attorneys in their performance before this judge, or if the spouse's position or compensation in the prosecutor's office depends on the performance of those he supervises in their appearances before this judge, then the judge's impartiality might reasonably be questioned. Were the appearances of these attorneys before this judge only occasional, the impact of the judge's rulings would be diluted and the problem rendered inconsequential. But the facts presented here reveal that the attorneys appear regularly before this judge, and, in fact, are the only lawyers supervised by the spouse.

We next consider the spouse's role as an attorney. The only facts presented which bear on this point are that the spouse reviews the judge's minute entry orders for errors. To have the attorney spouse review the judge's work for errors undermines the appearance of judicial independence and is therefore unacceptable. Unless this task is reassigned to another lawyer, the judge must disqualify herself because her impartiality might reasonably be questioned.

Although the facts presented do not discuss it, we assume that a supervising attorney may advise and consult with those he supervises regarding trial technique and strategy, evidentiary questions, sentencing and similar matters not of an administrative nature. When the supervising attorney does so, he acts as an attorney in that case even if he is not counsel of record and never appears personally in court.

Advisory Opinion 95-19

Unless other circumstances suggest to the contrary, we believe that the judge reasonably may rely on the deputy county attorneys to inform the judge whenever the spouse has played such a role in the case. If the judge communicates to these attorneys the importance of revealing this information, the judge need not make a special inquiry in each case. If the judge either chooses not to communicate her expectation that the prosecutors reveal the information on their initiative, or otherwise doubts the efficacy of such an approach, the judge should disclose the spousal relationship and make a specific inquiry in each case in which one of the supervised attorneys appears.

The third potential difficulty is that the judge may obtain personal knowledge of the facts of a case from her spouse. The spouse may discuss cases with the attorneys he supervises either on a professional basis or on the casual basis that lawyers exchange information about their work activities over coffee or lunch at the workplace, or at social events outside the workplace. If information about the facts is thereby obtained by the spouse, and later communicated to the judge, then disqualification in that case is required. We believe, however, that the judge and her spouse can reasonably be expected to avoid discussion of cases in the spouse's trial group and which may be assigned to the judge. Thus, we conclude that the risk that information will be communicated is limited to rare, inadvertent occurrences and does not require automatic disqualification.

We recognize that our opinion may not foresee all the ways in which the judge may be affected by the spousal relationship. We therefore do not intimate that the instances in which we have opined that disqualification is required are the only such cases. It must be remembered that Canon 3E requires disqualification whenever a judge's impartiality might reasonably be questioned, unless remittal occurs under Canon 3F. Of course, most concerns can be eliminated simply by reassigning the judge to a calendar with no direct connection to the spouse.

We also recognize that while our Opinion 91-01 held that the judge was not disqualified under the circumstances, it also advised that the "better course" might be disqualification. Again, disqualification and disclosure are not required when the judge's impartiality cannot reasonably be called into question. Canon 3F— remittal of disqualification—applies only when a judge is subject to disqualification under Canon 3E.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 3E and 3F (1993).

Other References

Arizona Judicial Ethics Advisory Committee, Opinions [91-01](#) (April 29, 1991); [95-10](#) (June 15, 1995).